

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2010 MSPB 96

Docket No. CH-0752-08-0811-I-2

**Rex T. Nelson,
Appellant,**

v.

**United States Postal Service,
Agency.**

May 25, 2010

Rex T. Nelson, Benton Harbor, Michigan, pro se.

Deborah W. Carlson, Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his refiled appeal as untimely. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at [5 C.F.R. § 1201.115](#), and we therefore DENY it. We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#), however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, STILL DISMISSING the refiled appeal as untimely.

BACKGROUND

¶2 On September 17, 2008, the appellant filed a timely appeal of his August 18, 2008 removal from the position of PS-6 Sales, Services/Distribution Associate for failure to properly record and handle window cash transactions. Initial Appeal File (IAF) 1, Tabs 1; 5; 7, Subtabs 4A, 4E, 4F. The agency moved to dismiss the appeal pending adjudication of the concurrent criminal prosecution against the appellant for embezzling postal funds. *Id.*, Tab 7, Subtab 1 at 4. In a November 13, 2008 initial decision, the administrative judge dismissed the appeal without prejudice to refiling by May 13, 2009. IAF 1, Tab 8. The administrative judge acknowledged that the appellant objected to the motion to dismiss, but found that dismissal was appropriate because the charges underlying the agency's action were related to the pending criminal charges. *Id.* On March 11, 2009, the Board denied the appellant's petition for review of the initial decision by issuing a Final Order. Petition For Review (PFR) File 1, Tab 4.

¶3 Nearly 4 months after the refiling deadline, the appellant refiled his appeal on September 10, 2009. IAF 2, Tab 1. The administrative judge issued an initial decision granting the agency's motion and dismissing the refiled appeal as untimely. The administrative judge found that the previous initial decision unequivocally established a May 13, 2009 deadline for refiling and stated that an appeal refiled after that date would be dismissed absent good cause. The administrative judge further found that there was no support for the appellant's allegations that he had 6 months to refile from the Board's Final Order, or 60 days to refile from the end of his criminal trial. The administrative judge concluded that the appellant had failed to show that his appeal was timely refiled or that good reason existed to waive the deadline. IAF 2, Tab 8.

¶4 The appellant has filed a timely petition for review. PFR File 2, Tab 1. The agency has filed a response opposing the petition for review. *Id.*, Tab 4.

ANALYSIS

The appellant failed to show that he timely refiled his appeal.

¶5 The appellant asserts that the administrative judge erred in finding that he did not timely refile his appeal. He contends that the administrative judge erred in stating that the Board denied his previous petition for review on March 22, 2009, instead of on March 11, 2009, and that he pled guilty on March 12, 2009, instead of on March 13, 2009. He thus apparently argues that the administrative judge failed to recognize that the Board's March 11, 2009 Final Order was issued before he pled guilty to the criminal charge. He reiterates his argument that he believed that, if he had refiled his appeal before his criminal case was finalized, the agency would have filed another successful motion to dismiss without prejudice. He contends that he was informed to wait until the criminal case was over to refile his appeal; that the criminal case was over on July 31, 2009; and that he believed that he had 60 days from that date to refile his appeal. He also reiterates his argument that he had 6 months from the date of the Board's Final Order to refile his appeal. He notes that he refiled his appeal within both of those deadlines. PFR at 1-2.

¶6 As the appellant asserts, the administrative judge incorrectly identified the dates of the Board's Final Order and the appellant's guilty plea. *See* ID at 2; PFR File 1, Tab 4; IAF 2, Tab 7 at 16. Moreover, the administrative judge did not explain the significance of the date of the appellant's guilty plea, which is not a conviction or judgment that signals the disposition of a criminal charge. *See, e.g., Taylor v. Department of the Air Force*, [89 M.S.P.R. 402](#), ¶¶ 6-8 (2001) (finding that Taylor's guilty plea and entry into a pre-trial probationary program did not constitute "the disposition of . . . criminal charges" for purposes of determining the refiling date because the court did not enter judgment or obtain a conviction and Taylor remained subject to prosecution and sentencing subject to successfully completing the program). In that regard, the administrative judge

did not mention that judgment against the appellant in the criminal proceedings was not entered until July 31, 2009. IAF 2, Tab 7 at 17.

¶7 Notwithstanding the administrative judge's errors, however, the appellant has failed to show that he timely refiled his appeal. He has failed to cite any authority for his assertion that his refiled appeal should be considered timely because it was filed within the purported 6-month and 60-day deadlines. He has similarly not identified who allegedly informed him of those deadlines. Thus, the refiled appeal was approximately 4 months late. Further, even considering the delay in the light most favorable to the appellant, he still waited approximately 1½ months after the July 31, 2009 conclusion of his criminal case to refile his appeal. Therefore, the administrative judge's errors did not prejudice the appellant's substantive rights, and, thus, provide no basis for reversing the initial decision. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281](#), 282 (1984).

The appellant has failed to show that good cause exists for his untimely filing under the specific standards the Board applies to refiled appeals and appeals dismissed without prejudice pending the resolution of criminal cases.

¶8 The Board has repeatedly held that its dismissal without prejudice practice should not become a trap to deny an appellant the opportunity to have his case decided on the merits. *See Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶ 6 (2007); *Hodges v. Office of Personnel Management*, [101 M.S.P.R. 212](#), ¶ 11 (2006); *Jackson v. Office of Personnel Management*, [89 M.S.P.R. 302](#), ¶ 10 (2001); *Brown v. Office of Personnel Management*, [86 M.S.P.R. 417](#), ¶ 8 (2000). Accordingly, it has identified specific standards applicable to determining whether good cause exists for excusing an untimely refiled appeal of a matter previously dismissed without prejudice pending the resolution of criminal proceedings. *See Gaddy v. Department of the Navy*, [100 M.S.P.R. 485](#), ¶ 13 (2005). These include the following: the appellant's pro se status; the timeliness of the initial appeal; the appellant's demonstrated intent

throughout the proceedings to refile the appeal; the length of the delay in refiling; confusion surrounding and arbitrariness of the refiling deadline; the number of prior dismissals without prejudice; the agency's failure to object to the dismissal without prejudice; and the lack of prejudice to the agency in allowing the refiled appeal. *Id.* Further, in *Jaramillo*, [106 M.S.P.R. 244](#), the Board noted its policy to stay its proceedings when criminal proceedings involving the same matter are pending. *Id.*, ¶ 7. Although the administrative judge did not apply the appropriate analysis to the refiled appeal in this case, the error did not affect the outcome, and, therefore, is not grounds for overturning the initial decision.

¶9 Although it is true that (1) this pro se appellant did timely file his initial appeal, (2) his appeal was previously dismissed without prejudice only once and at the agency's request; and (3) there is no apparent prejudice to the agency in allowing the refiled appeal, the record does not otherwise support finding that the appellant established good cause to excuse his untimely refiling. Specifically, the initial decision dismissing the appeal without prejudice clearly identified the date for refiling the appeal and warned the appellant that failure to refile by that date would "result in a finding that the appellant has waived his right to pursue the issues raised by the appeal, absent a showing of good cause for any filing delay." IAF 1, Tab 8 at 3 n.1; *cf. Hodges*, [101 M.S.P.R. 212](#), ¶ 13 (finding the refiling deadline unreasonable because it did not set a "date certain" for when the appellant must refile her appeal). Further, the deadline was not arbitrary, but based on the agency's estimate of when the criminal proceedings would be concluded. Conversely, as previously noted, the appellant failed to provide any evidence justifying any confusion over the deadline, and in particular, supporting his belief that he had either 6 months from the Board's final decision or 60 days from the end of his criminal case to refile his appeal. Moreover, even if he believed that refiling before his criminal case was completed would have been futile, he nonetheless failed to explain why, given the date certain for refiling, he neglected to contact the regional office to request an extension. In addition, the

appellant's 4-month delay was hardly minimal. *See Gulley v. Department of the Treasury*, [101 M.S.P.R. 48](#), ¶ 9 (2006). Even considering the delay in the light most favorable to the appellant, he still waited approximately 1½ months after the July 31, 2009 conclusion of his criminal case to refile his appeal.

¶10 Thus, considering this case under the specific standards applicable to a refiled appeal of a matter previously dismissed without prejudice pending the resolution of criminal proceedings, we find that the appellant has failed to show that good cause exists for excusing his untimely refiling. Accordingly, we decline to waive the refiling deadline in this appeal.

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.